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ALEXANDER L. STEVAS,
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No. 81-2320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH DAZZO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Did the sentencing court's consideration of impermissible criteria and rejection of all considerations except that of general deterrence deprive petitioner of due process of law?

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JOSEPH DAZZO,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Dazzo, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 22, 1982. Motion for rehearing *en banc* was denied on April 21, 1982.

Opinions Below

The opinion of the Court is reported at 672 F.2d 284 (2d Cir. 1982) and appears as Appendix A to this petition. The Court of Appeals affirmed a judgment entered following a jury trial in the United States District Court, Eastern District of New York (Jack B. Weinstein, C.J.), convicting petitioner of conspiracy to possess marijuana with intent to distribute (21 U.S.C. §846), possession with intent to distribute marijuana and quaaludes (21 U.S.C. §841(a)(1), 18 U.S.C. §2), and one count of importation of marijuana

and quaaludes (21 U.S.C. §§952(a), 960, 18 U.S.C. §2). Petitioner was sentenced to a term of 5 years imprisonment on each of the three counts, to run consecutively, a $15,000 fine on each count, and a term of life parole.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the Court of Appeals denial of petitioner's motion for rehearing and rehearing *en banc* dated April 21, 1982.

Constitutional Provisions Involved

United States Constitution, amendment 14.

This appears as Appendix B to this petition.

Statutory Provisions Involved

18 United States Code §2, §3577, §4216; 21 United States Code §841(a)(1), §846, §952(a), §960. These provisions appear in Appendix C to this petition.

Statement of the Case

Petitioner, Joseph Dazzo, was tried and convicted in the United States District Court for the Eastern District of New York following a jury trial before Chief Judge Weinstein of participating in a conspiracy to import large quantities of marijuana into the Eastern District of New York by boat. Dazzo was alleged to have participated in the purchase of a boat in Norfolk, Virginia, and to have supervised the repair and modifications of the vessel in Sheeps-

head Bay, Brooklyn. The boat was later used to transport the controlled substances in question.

On June 5, 1982, Dazzo, a twenty-five year old first offender, was sentenced on his conviction for one count of conspiracy to import marijuana with the intent to distribute it, one count of possession with intent to distribute a large quantity of marijuana and quaaludes, and one count of importation of marijuana and quaaludes. The District Court sentenced petitioner to a term of five years imprisonment on each count, the terms to run consecutively, for a total of 15 years in prison. In addition, Dazzo was sentenced to a special parole term for life, as well as a $15,000 fine on each count, for a total of $45,000.

The District Court, conceding that petitioner would have an appeal on the basis of its sentence, imposed the maximum sentence on Dazzo. The basis for the sentence, as articulated by the Court, was that in April, 1981, during the course of the trial, a prosecution witness, James Bennett, was murdered. The District Court explained that the sentence was being imposed with general deterrence as the sole objective and not for any rehabilitative effect it would have on Dazzo. By imposing such a severe sentence, the court sought to send a message to those in the criminal community who might be tempted to interfere with witnesses.

At sentencing the District Court acknowledged that Dazzo did not know the witness* was to be murdered and that Dazzo was neither directly nor indirectly responsible for the act. Despite this acknowledged lack of either responsibility or knowledge on Dazzo's part, the District Court sentenced Dazzo as a "member of a gang of international

* The witness, James Bennett, was not testifying against Dazzo. His testimony related solely to a co-defendant, Mastrangello.

drug smugglers and murders" to the maximum sentence allowable under the law.

On appeal to the United States Court of Appeals, counsel contended that Judge Weinstein's sentence should be vacated and petitioner's case remanded for resentencing because the court sentenced Dazzo in an unconstitutional manner by relying upon a murder he did not commit and intimidation he did not engage in. In addition, counsel disputed that there was any support in the record to properly establish that Dazzo intimidated or caused to be intimidated witnesses at the trial.

Furthermore, counsel contended the sentencing court's reliance upon general deterrence to the total exclusion of all other sentencing considerations constituted an abuse of discretion as a matter of law.

REASONS FOR GRANTING THE WRIT

ARGUMENT

The Sentencing Court's Consideration of Impermissible Criteria and Rejection of All Considerations Except That of General Deterrence Deprived Petitioner of Due Process of Law.

We seek review in this Court as a matter of due process and fundamental fairness to consider whether the majority opinion reflects the permissible factors sentencing judges may consider or whether Judge Bartels' dissenting opinion reflects the balanced consideration required prior to the imposition of a sentence in a federal district court.

A. *The Sentencing Court's Consideration of Impermissible Criteria—the Unconnected, Post-Conspiracy Acts of Others —Deprived Petitioner of Due Process of Law*

Joseph Dazzo, a twenty-five year old first offender, was sentenced upon his conviction for one count of conspiracy to possess with intent to distribute marijuana, one count of possession with intent to distribute marijuana and methaqualone tablets, and one count of importation of marijuana and methaqualone tablets to three consecutive terms of five years imprisonment for a total of 15 years, lifetime parole and a total of $45,000 in fines. The basis for the sentence, as articulated by the District Court, was that a witness had been murdered during the course of the trial and the Court inferred the murder was the responsibility of one of Dazzo's co-defendants.

Although the identity of the murderer was unknown, and the District Court conceded Dazzo was neither directly or indirectly responsible for the murder, nor had had any knowledge it was to take place, Dazzo was sentenced as a member of a gang of drug smugglers who engaged in murder. The sentencing process by which the particular punishment imposed herein was determined violated petitioner's right to due process of law.

While it is axiomatic a district court may as a general rule consider unlimited accurate information concerning the background, character and conduct of a person convicted of an offense, (18 U.S.C. §3577), and that criminal sentences are not generally reviewable, the exercise of sentencing discretion is not totally unfettered. There are well recognized constitutional constraints, as well as concerns for fairness, reliability, balance and procedural safeguards which provide the primary limitations on the range of permissible sentencing considerations. As this court has stated in *Dorszynski* v. *United States*, 418 U.S. 441, 445 (1974)

> Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases. *United States* v. *Hartford*, 489 F.2d 652, 654 (CA5 1974). (Emphasis in original).

Thus this Court may properly review the factors the sentencing judge considered in reaching the decision to impose the maximum consecutive sentence in this case. *See United States* v. *Harris*, 558 F.2d 366 (7th Cir. 1977) (use of hearsay information); *United States* v. *Stein*, 544 F.2d 96 (2d Cir. 1976) (use of erroneous records).

This court has upheld the use of out-of-court information by a sentencing judge as within the judge's broad discretionary powers. In *Williams* v. *New York*, 337 U.S. 241 (1949), the use of a pre-sentence report detailing the defendant's past life, habits, mental and moral propensities was upheld as not violative of due process. In *United States* v. *Grayson*, 438 U.S. 41 (1978), this Court held that a judge may properly consider defendant's false testimony at trial when sentencing, and consideration of this factor does not violate due process. Most recently, in *Roberts* v. *United States*, 445 U.S. 552 (1980), the refusal of the defendant to cooperate with government officials investigating a related criminal conspiracy was held to be a proper consideration for the sentencing court and not violative of due process.

All of the above cases can be distinguished from the case here, however, by the fact that they involved knowing,

willful acts of the defendant. In *Williams, Grayson* and *Roberts,* the defendants had committed the act or acts which the sentencing court used in determining its sentence. In the case at bar, Dazzo's sentence is based upon post-conspiracy conduct which he had no part in and which the court acknowledges he had no knowledge of. Petitioner contends that to sentence him on this basis is, in effect, to find him guilty by association.*

Clearly such a sentencing procedure violates petitioner's right to due process. This Court held similarly in *Townsend* v. *Burke,* 334 U.S. 736 (1948), where it held that sentencing on the basis of misinformation concerning a defendant's criminal record was inconsistent with due process.

While both the majority and dissenting opinions in *Dazzo* agree it is a denial of due process for a judge to consider or rely upon improper criteria as part of the calculus of sentencing, the majority seemingly articulates no criteria which it currently feels would constitute an improper sentencing factor. Petitioner contends the judge's outrage at the out of court acts of others is clearly not a proper basis for sentencing in this case and the case should be remanded for re-sentencing utilizing constitutionally proper criteria.

B. *The Court's Rejection of All Considerations Except That of General Deterrence Deprived Petitioner of Due Process of Law*

The District Court, in imposing sentence upon the defendant, stated:

> Don't talk about rehabilitation, because I have no intention of rehabilitating him. I'm not going to sen-

* There was no proof that a co-defendant or co-conspirator was the perpetrator of Bennett's murder.

> tence him for rehabilitation purposes. He's going to be sentenced for deterrence, solely.

Slip opinion at 1413 (14a-15a).

The imposition of sentence solely on the basis of general deterrence with a total disregard of any individualized and relevant circumstances deprived petitioner of his due process right to be sentenced within appropriate discretionary boundaries.

Dazzo was a first offender. His participation in the offenses was limited and related only to the purchase and modification of the boat. The last act charged in the indictment was completed in November, 1978, prior to the actual delivery of drugs and long before the witness was murdered during the course of the trial. Indeed, the sentencing judge did not connect Dazzo in any way with that act. Rather the District Court stated at sentencing that Dazzo is:

> A rather callow, unsophisticated youth who got involved in a major drug conspiracy because he saw some easy money, without understanding the full implications of what he was doing. It's perfectly clear, and if he hadn't done that, he probably would have led an uneventful life with a loving wife, a family and children.

Moreover, Dazzo, because of his age, was at least eligible to be sentenced as a youthful offender under 18 U.S.C. §4216.* These individual considerations, however, were explicitly not considered by Judge Weinstein. The discre-

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* A comparison of the general sentencing statute, 18 U.S.C. §3577, with 18 U.S.C. §4216, bespeaks a congressional intent to require federal sentencing judges to consider the criteria set forth in §4216 based upon the defendant's age and the strong presumption that rehabilitation was likely.

tionary function, predicated upon the sections' criteria, was expressly ignored. In a prior decision, *United States* v. *Negron*, 548 F 2d 1085 (2d Cir. 1977), the Court of Appeals held that despite the broad discretion granted the court in sentencing under the young adult offender statute, a judge may abuse his discretion if he focuses on only one factor in a "fixed and mechanical way" when determining sentence. As noted in *Negron*, a judge must at least consider the propriety of sentencing under 18 U.S.C. §4216. Petitioner in the case at bar was denied that consideration.

In *Williams* v. *New York, supra*, Mr. Justice Black, writing for the Court, held that the "prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime," and, therefore, sentences should be determined with an eye toward the "reformation and rehabilitation of offenders." *Id.* at 248. In order to achieve the goal of personalizing sentences, the sentencing judge is provided with information contained in pre-sentence reports. Moreover, the recent trend of decisions has been to further broaden the criteria which may legitimately be considered as evidence.

In both *Roberts* and *Grayson, supra*, this Court endorsed a rehabilitative theory of punishment. The Court thus found both non-cooperation and perjury relevant to the sentencing task of predicting the capacity for rehabilitation present in either defendant and, therefore, these criteria were appropriate for consideration at sentencing. In the instant case, unlike *Roberts* and *Grayson*, the District Court did not seek to achieve any rehabilitative function. Rather, the Court sentenced petitioner solely in the hope of achieving general deterrence of others. Accordingly the sentence imposed here violates defendant's right to be sentenced in a rational manner relating to the nature of the

offense and the offender and not for the sole purpose of general deterrence.

Courts in other circuits have found it impermissible for a sentencing judge to entirely disregard the rehabilitative philosophy in imposing sentence. A court which has adopted a mechanical sentencing policy without considering mitigating factors in the offense or offender may be found to have abused its discretion. *United States* v. *Cavazos*, 530 F.2d 4 (5th Cir. 1976). Similarly in *United States* v. *Wardlaw*, 576 F.2d 932, 938-39 (1st Cir. 1978), the Court of Appeals held improper an increased sentence for a drug smuggler based on the court's belief that higher level drug dealers would be apprehended. The Court stated:

> In any event, while sentencing judges have considerable discretion in sentencing, they may not relentlessly pursue at a defendant's cost a single, questionable theory while simply brushing aside all the other criteria commonly weighed by the vast majority of sentencing courts. Defendants were entitled to have their sentences set primarily in terms of the seriousness of their own crimes and associated individual factors. They were not to be viewed chiefly as instruments of retaliation against other, different criminals.

576 F.2d 939.

In the case at bar, the sentencing judge employed the kind of mechanical and impermissible approach invalidated by the courts in *Cavazos* and *Wardlaw*. The judge focused upon a proper penological consideration to the exclusion of all other factors. The natural result of that methodology was not only that Dazzo's sentence was not individualized or relevant to the circumstances of his participation in the offense and his personal background, but also that he was

sentenced on the basis of conduct which the judge admitted Dazzo had no part in or knowledge of.

Petitioner's situation is analogous to that of a defendant who is entitled to protection from a sentence based on groundless inferences or unfounded assumptions. *See Roberts* v. *United States,* 445 U.S. 552 (1980), 100 S.Ct. 1358, 1366 (1980). (Mr. Justice Brennan concurring). Although in the instant case the assumed impact on other defendants of meting out harsh sentences in order to deter people from interfering with the criminal justice system may have some speculative validity, it is improper to have applied that theory as the sole basis for the imposition of sentence on the petitioner, a *prima facie* young adult offender. Such a sentence is irrational and arbitrary when applied to this defendant. The exclusion of the mitigating factors of defendant's youth and lack of criminal record is equally improper. *United States* v. *Wardlaw,* 576 F.2d 932, 938-39 (1st Cir. 1978).

The majority opinion in the case at bar states that the sentencing judge did not rely on "erroneous information or constitutionally impermissible factors in imposing sentence." Slip opinion at 1409 (a). Petitioner contends this holding is contradictory to the decisions reached by courts in other Circuits as well as decisions in this Circuit.

In structuring its opinion the majority in *Dazzo* creates an impression that the law in this area, and within the Circuit, is settled, when in truth and fact it is not. Thus, the Court cites *Fielding* v. *LeFevre,* 548 F.2d 1102 (2d Cir. 1977), for the notion that "[t]here is no constitutional principle that prefers rehabilitation over deterrence . . . as a goal of sentencing." However, it is clear this quote, taken out of context from Judge Meskill's decision, was *dicta,* for as the opinion carefully noted:

> Essentially, he [Petitioner Fielding] asks this Court to review a sentence handed down by a state court, which we are powerless to do. The fact that the man cast his argument in constitutional terms does nothing to change this. Arguments such as this are properly addressed to the state court. . . .

Fielding v. *LeFevre, supra* at 1108.

The majority's reliance upon Justice Rehnquist's in chambers opinion in *Atiyeh* v. *Capps*, 449 U.S. 1312 (1981), is likewise misplaced. The quoted portion, at 1410 (10a) of this Court's slip opinion, is *dicta* from an opinion denying an injunction pending appeal to the Ninth Circuit Court of Appeals in a lawsuit dealing with alleged overcrowded prison conditions in the Oregon State Penitentiary. The *dicta* found therein was hardly intended to be binding authority under *stare decisis* for applications to the propriety of federal criminal sentences generally, or young adult offenders specifically.

As the Court of Appeals for the First Circuit has noted in *United States* v. *Wardlaw*, 576 F.2d 932 (1st Cir. 1978), criminal defendants are entitled to have their sentences set primarily in terms of the seriousness of the offense and factors which are individual to the defendants background and conduct. It is improper to mechanically impose sentence with no regard for other proper and relevant sentencing criteria.

The consideration of one sentencing factor to the total exclusion of all other factors is a situation which warrants this court's review of the process by which the punishment imposed was determined. As such, it is analogous to the situation where a sentencing court refuses to exercise its discretion as a matter of policy. In *United States* v. *Menghi*, 641 F.2d 72 (2d Cir. 1981), the court refused to approve

an inflexible sentencing practice which contradicted the judicially approved policy in favor of individualizing sentences. 641 F.2d at 76, quoting *Williams* v. *New York*, 337 U.S. 241, 248 (1949). Based on this reasoning, the fixed sentencing process which was engaged in herein cannot be approved in light of general constitutional principles founded upon due process notions of fundamental fairness, as well as those specifically applicable to a young adult offender.

Accordingly, because the *nisi prius* court, in imposing sentence, and a majority of the Court of Appeals, in affirming sentence, have broken new ground in sentencing in a fashion contrary to all past recognized notions, we believe the judgment of the Circuit Court should be reviewed.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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* We gratefully acknowledge the assistance of Barbara L. Hartung on this brief.

APPENDIX

Appendix A

(Opinion of United States Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 243—August Term, 1981

(Argued: December 1, 1981 Decided: February 22, 1982)

Docket No. 81-1268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JOSEPH DAZZO,

Appellant.

Before:

FEINBERG, *Chief Judge,* LUMBARD, *Circuit Judge,* and BARTELS, *District Judge.**

Appeal from conviction of conspiracy, and possession and importation of marijuana and quaaludes with intent to distribute, after a jury trial before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York.

Affirmed.

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* Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation .

WILLIAM J. MULLER, Brooklyn, N.Y. Assistant United States Attorney for the Eastern District of New York (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, of Counsel), *for Appellee.*

ROGER BENNET ADLER, New York, N.Y. (Newman & Adler, Deborah A. Schwartz, of Counsel), *for Appellant.*

FEINBERG, *Chief Judge:*

Defendant Joseph Dazzo appeals from a judgment of conviction in the United States District Court for the Eastern District of New York after a jury trial before Jack B. Weinstein, Chief Judge. Appellant was convicted of conspiracy to distribute a substantial quantity of marijuana in violation of 21 U.S.C. § 846, possession with intent to distribute of a substantial quantity of marijuana and methaqualone in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and importation of a substantial quantity of marijuana and methaqualone in violation of 21 U.S.C. §§ 952(a), 960 and 18 U.S.C. § 2. The judge sentenced appellant to a five-year prison term on each of these three counts, to be served consecutively, cumulative fines amounting to $45,000, and lifetime special parole. Appellant is incarcerated pending the outcome of this appeal.

I.

The evidence at trial established the existence of an extensive conspiracy to import large quantities of marijuana into New York from Colombia between November 1977

and November 1978. The marijuana was smuggled into the United States on a trawler, the "Terry's Dream," which was towed into port by the "Bill Mather," a tugboat. The testimony of Jesus Vega, a Coast Guard officer, and Robert De Grande, an individual recruited to serve on the "Terry's Dream" during its smuggling operations, indicated that this method was repeatedly used to bring marijuana into the United States. The operation came to an end, however, when both vessels were seized by the Coast Guard on the night of November 11-12, 1978.[1] A search of the vessels and vehicles revealed approximately 23 tons of marijuana and one-half million methaqualone tablets worth more than $15 million. No one was arrested at the time of the seizure because those involved had fled the premises shortly before.

Fifteen individuals, including appellant, were subseqently indicted for various narcotics violations. See United States v. Saint Prix, Nos. 81-1214 to -1217, slip op. — (2d Cir. February —, 1982). Before trial, however, appellant and Richard Mastrangelo were granted severances due to the unavailability of their counsel.

Appellant was linked to this conspiracy through evidence that he had purchased the "Bill Mather."[2] According to Frederick Ardolino, a commercial fisherman and boat surveyor in Brooklyn who testified under a compulsion order, appellant approached him about the purchase of a small tugboat in late 1977 or early 1978. Appellant bought the "Victory" from Ardolino, but it developed engine trouble and sank on the date of purchase.

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[1] Coast Guard officers also seized several trucks and vans, used to transport the narcotics from the marina, and a Buick sedan.

[2] Another person, Edgar Taylor, was apparently responsible for purchase of the "Terry's Dream" at a cost of $177,000.

Shortly after this abortive transaction, appellant again approached Ardolino about purchasing a tugboat for his friend. "John Ward." In fact, "John Ward" was really appellant's friend, John Bennett. "Ward" told Ardolino that he was interested in a small tugboat to tow oil barges, that he did not want to spend more than $65,000, and that he wanted the vessel as soon as possible. "Ward" also told Ardolino that he was interested in buying some deep waterfront dockage in Long Island that was easily accessible from the ocean.

In January 1978, Ardolino, his cousin James Crispino, who was appellant's friend, "Ward," and two other individuals flew to Norfolk, Virginia to inspect the "Bill Mather." Appellant joined this group in Virginia, according to Ardolino. On January 30, 1978, the group of purchasers, including appellant, went to a shipyard in Norfolk to view the "Bill Mather." A shipyard representative, Alfred Jensen, identified appellant as a member of the group. The group told Jensen that it had a contract to haul garbage barges in New York and asked whether the "Bill Mather" could go 20 miles out to sea. After returning the next day for a test run, the group had the boat hauled out of the water to inspect the bottom and ultimately had steel plates installed to protect the bow area from ice. The cost of hauling the boat and installing the shields was approximately $2,000.

In early February 1978, the group, including appellant, purchased the "Bill Mather" for $59,000. Because the Norfolk shipyard would not accept cash, "Ward" obtained a cashier's check at a Norfolk bank. The check was only issued, however, after Ardolino offered his identification. "Ward" then signed the bill of sale on behalf of J & L Towing, the purchaser, Ardolino thereupon received be-

tween $600 and $750 in cash plus expenses for his services.

Later in February, the "Bill Mather" arrived in New York from Norfolk. Because of ice formations, the boat had to stay at Ardolino's dock for approximately one week before proceeding to Yancarib Marina, where the "Terry's Dream" was anchored. During this period, appellant came to Ardolino's dock to congratulate "Ward" on obtaining the tug.

Appellant was also linked to the conspiracy through his handling of repairs on the "Bill Mather." In April 1978, the "Bill Mather" arrived at Muller's boatyard in Brooklyn for repairs. "Ward" had previously contacted Ardolino about this repair work and stated that he was not concerned with price.

Appellant and two other men brought the "Bill Mather" to the boatyard. In dealing with boatyard employees, appellant used the names "John Ward" and "John Ward, Jr." Appellant also falsely stated to the yard foreman, Jim Muller, that the "Bill Mather" was under contract with New York City to tow garbage scows. During the two weeks in which repairs were performed, appellant came to the boatyard six to twelve times. At those times, appellant spoke with Muller about what work had been performed, what needed to be done, and what the repairs would cost. After completion of the initial repairs, appellant authorized several additional repairs on the vessel after receiving cost estimates from Muller. Appellant was identified not only by Jim Muller but also by another employee at the boatyard, Kathy Muller.

On April 25, 1978, the cost of these repairs was calculated as $12,954.54. Muller's boatyard received $13,000 in money orders worth $1,000 each and issued a refund

check payable to cash for $45.15. Diane Dazzo, appellant's wife, endorsed and cashed this refund check.

Appellant did not testify and called only one witness, his wife. She testified that Glenn Hutchison, a defendant in United States v. Saint Prix, supra, had given her husband the Muller Boat Works refund check in April 1978 and asked him to cash it. She asserted that her husband had then given the check to her, and she endorsed and cashed it.

Appellant's trial was marked by numerous disturbing events. On April 29, 1981, the government's only witness against Mastrangelo, appellant's co-defendant, was murdered by two gunmen in Brooklyn. As a consequence, the district court was forced to declare a mistrial with respect to Mastrangelo. Moreover, government witnesses were repeatedly approached and intimidated. One witness was informed at gunpoint that if he went into the grand jury and testified at trial, he and his family would be killed. The week before trial, Ardolino told Jim Muller that Kathy Muller, the only known witness against appellant at the time, should give vague testimony at trial and that "they" would take care of her.

Appellant's trial ended on May 1, 1981 with a jury verdict of guilty. The judge sentenced appellant on June 5, 1981. In imposing sentence, the district court assumed that appellant neither knew that a witness was to be murdered nor approved of it. It found, however, that he was aware of the attempts to intimidate witnesses. The court also noted that appellant had not cooperated with the government. Under these circumtances, the court indicated that it did not view rehabilitation as a substantial factor and instead sentenced appellant for deterrent purposes.

II.

In this court, appellant claims that the evidence at trial was legally insufficient to support a conviction; that he was denied a fair trial because the prejudicial effect of admitting evidence regarding his pre-conspiracy purchase of the "Victory" far outweighed its probative value; that the district court erred in admitting testimony on the "street value" of the seized drugs; that the government improperly obtained and utilized appellant's tax returns; and that appellant was denied due process because his sentence was based on consideration of improper criteria and the sentence was so excessive as to constitute cruel and unusual punishment.

Appellant's contention that there was insufficient evidence to warrant his conviction must be rejected. A considerable body of evidence, which stood essentially unrefuted, supported the jury's conclusion that appellant had been involved in the extensive conspiracy to import narcotics outlined above. Two witnesses, Ardolino and Jensen, testified that appellant was one of the purchasers of the "Bill Mather" in Norfolk. Kathy and Jim Muller, two employees at Muller's boatyard, identified appellant as the individual who, under an assumed name, oversaw repairs on the "Bill Mather" in April 1978. In addition, appellant's wife cashed a refund check from the shipyard. Ardolino also testified that appellant had been involved in the purchase of another tugboat, the "Victory". Viewed in the light most favorable to the government and with all permissible inferences construed in the government's favor, United States v. Ruffin, 575 F.2d 346, 353-54 (2d Cir. 1978), this evidence was sufficient to support appellant's conviction.

Similarly, the trial court properly admitted evidence of appellant's purchase of the "Victory" under Fed. R. Evid.

403. Under that rule, a trial judge is vested with broad discretion in determining whether the probative value of evidence is outweighed by its prejudicial impact. Evidence of the purchase clearly had probative value. The transaction occurred within the period of time covered by the conspiracy, and as the prosecutor pointed out in an offer of proof made at side bar, the government contended that the "Victory" had been purchased for use in drug trafficking; therefore, when it sank, appellant promptly arranged the inspection and purchase of the "Bill Mather." As against this, it is not clear what prejudice appellant points to, except the logical inferences pressed by the government. This is not the "unfair prejudice" alluded to by the rule. Under the circumstances, the trial court's exercise of its broad discretion should not be disturbed. See United States v. Williams, 596 F.2d 44, 50 (2d Cir.), cert. denied, 442 U.S. 946 (1979).

The trial court also properly admitted evidence of the value of the narcotics seized. Contrary to appellant's contention, the court specifically limited Special Agent John Huber's testimony to wholesale value, and no evidence of "street value" was admitted. Appellant did not object to this testimony and therefore waived this claim on appeal. United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978). Assuming arguendo that the claim is properly before us, however, appellant's argument still fails. The value of the narcotics was relevant in discrediting the defense theory that the evidence did not establish that appellant was a knowing member of the conspiracy. In light of the large amounts of money involved, the government argued that it was unlikely that the other conspirators would have allowed appellant to play such a critical role in the conspiracy unless he knew what

was being planned and the need for secrecy. Under these circumstances, evidence of the wholesale value of the drugs was properly admissible. United States v. Lasalandra, 421 F.2d 1261, 1262-63 (2d Cir.) (per curiam), cert. denied, 398 U.S. 931 (1970); United States v. Glaziou, 402 F.2d 8, 16 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969).

Appellant also claims that we should reverse the conviction because the government improperly obtained and utilized his tax returns. The argument comes close to being frivolous. In obtaining the tax returns, the government scrupulously complied with the procedures and requirements of 26 U.S.C. § 6103(i)(1)(B), and the returns could properly be obtained through an ex parte application where, as here, they were relevant to the government's case. United States v. Barnes, 604 F.2d 121, 145-46 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). As in *Barnes*, appellant here had expended large sums of money, and his tax returns were admissible to show that his expenditures exceeded his reported earnings and were therefore probably derived from illicit activities. Id. at 146-47. Ultimately, however, only one document obtained under section 6103(i)(1)(B) was introduced into evidence, and it was offered only to provide an example of Diane Dazzo's signature. In fact, the government stated that it was willing to redact all but the signature line of the exhibit, but appellant's counsel requested that the jury be given the entire tax return. Moreover, appellant's counsel did not object to the introduction of this document at trial, and hence he cannot raise the claim on appeal. United States v. Knuckles, 581 F.2d at 313.

III.

Finally, appellant argues that his sentence of 15 years in prison, $45,000 in fines and lifetime special parole denied

him due process because it was based on improper criteria and was so excessive as to constitute cruel and unusual punishment. The scope of review of sentencing decisions is quite narrow. When the sentence imposed is within statutory limits, it is generally not subject to review unless the trial court relied on either material misinformation concerning the defendant or constitutionally impermissible factors. United States v. Tucker, 404 U.S. 443, 446-47 (1972); United States v. Mejias, 552 F.2d 435, 447 (2d Cir.), cert. denied sub nom. Padilla-Martinez v. United States, 434 U.S. 847 (1977). Appellant has not demonstrated that the trial judge relied on erroneous information or constitutionally impermissible factors in imposing sentence.

Appellant's principal argument is that the trial judge sentenced him for deterrent purposes and did not view rehabilitation as a substantial factor. In particular, appellant contends that he received a harsh sentence because a key witness was murdered and three of four other witnesses were intimidated. Appellant argues that it was an abuse of discretion to sentence him more severely as an example to others when he was not responsible for the mistreatment of witnesses.

The judge could certainly assess the deterrent effect on others in imposing a sentence. United States v. Snyder, No. 80-1322, slip op. 815, 823 (2d Cir. Jan. 15, 1982). Deterrence was an especially appropriate objective here because not only were appellant's offenses extremely serious but, as the district court found, he also acquiesced in the intimidation of witnesses through his knowing silence and refusal to cooperate with the government in any way. Cf. United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975) (judge could exercise discretion to enhance sentence because he believed defendant had per-

jured himself). As Chief Judge Weinstein pointed out, "[appellant was] being sentenced to deter others under these circumstances from joining gangs of importers of narcotics, and after the trial is commenced or prosecutions are commenced, from interfering with witnesses." As the judge added,

> This court will not tolerate interference with witnesses and murders of witnesses, and anyone involved in a case of this kind will be treated very harshly in order to deter others. Anybody participating in the trial has to understand that he's got to do everything to protect witnesses and not hurt them in any way, and the Bar has to understand that they've got to inform their clients of that.

It should also be noted that "[t]here is no constitutional principle that prefers rehabilitation over deterrence . . . as a goal of sentencing." Fielding v. LeFevre, 548 F.2d 1102, 1108 (2d Cir. 1977) (footnote omitted); see also Atiyeh v. Capps, 101 S. Ct. 829, 830 (1981) (Rehnquist, J.'s grant of application to stay final injunction) ("[T]here is nothing in the Constitution that says that 'rehabilitation' is the sole permissible goal of incarceration. . . ."). Hence, the trial court did not err in emphasizing deterrent purposes rather than rehabilitative ones.

Appellant also contends that his sentence was so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. This claim is also untenable. As the Supreme Court recently noted in Rummel v. Estelle, 445 U.S. 263, 272 (1980), "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." This case certainly does not qualify as one of those rare instances.

Most importantly, the sentence was within the statutorily prescribed maximum.[3] In light of appellant's involvement in a large-scale criminal organization that dealt in tons of drugs worth many millions of dollars and did not hesitate to use life-threatening force, the term imposed was not excessive. Moreover, appellant's sentence was comparable to those of other co-conspirators convicted of similar offenses. Appellant was one of the principal members of the conspiracy. He helped manage the substantial cash investment in the tugboat, and he supervised the repairs of the tug. In United States v. Saint Prix, supra, two other principals in the conspiracy, John Bennett and Glenn Hutchison, were sentenced to the maximum terms of imprisonment then authorized by law. Hutchison was convicted on one count and sentenced to the maximum of five years. Bennett was convicted on two counts and sentenced to the maximum of five years on each, to be served consecutively, and a special parole term of ten years. Here, appellant was convicted on three counts and received the maximum term, which amounted to 15 years plus lifetime special parole, just as other principals received the maximum terms for their offenses. Under these circumstances, the sentence clearly did not violate the Eighth Amendment's proscription against cruel and unusual punishment.

Because we find all of appellant's claims to be without merit, we affirm the judgment of the district court.

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[3] As the judge pointed out during sentencing, appellant received the maximum sentence authorized by statute. It should be noted, however, that after appellant committed these offenses, Congress tripled the maximum penalty for wholesale marijuana smuggling. Pub. L. No. 96-359, 94 Stat. 1190, 1194 (codified as amended at 21 U.S.C.A. §841(b)(6)(1981)). This indicates a congressional desire to deal harshly with drug offenders and reinforces our conclusion that the trial judge did not commit reversible error in imposing the statutorily-prescribed maximum.

BARTELS, *District Judge:* (concurring & dissenting)

I concur in the affirmance of the conviction. However, with all due respect, I must dissent to the process employed by the trial judge in imposing sentence.

The majority asserts that the trial judge "did not view rehabilitation as a substantial factor" but the trial judge went much further and his remarks supplied the appellant with his principal argument for remand. Indeed, the trial judge in imposing sentence stated: "I think you will have an appeal on the basis of this sentence." The offense committed by Dazzo was particularly egregious, and the murder of a witness in his co-defendant's trial demonstrated the character and background of his associates. The trial judge was righteously indignant and outraged. Such reaction, however, does not eliminate the necessity to individualize the sentence or to consider the rehabilitation of the defendant in imposing sentence.

As a general proposition, the appellate court has no power to change or reduce a sentence which falls within the requisite legislative limits on the ground that the sentence is too severe, *Townsend* v. *Burke*, 334 U.S. 736 (1948), unless the trial court abused its discretion or failed to exercise any discretion at all. *Dorszynski* v. *United States*, 418 U.S. 424, 443 (1974); *Yates* v. *United States*, 356 U.S. 363, 366-67 (1958). The criteria which a court relies upon in imposing sentence are not insulated from appellate review. In *United States* v. *Hartford*, 489 F.2d 652, 654 (5th Cir. 1974), the court said:

> Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than

> an unjustified incursion into the province of the sentencing judge, this latter responsibility is on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases.

It is that process with which we are here concerned.

The criteria relied upon by Judge Weinstein appear from the following statements made at the sentencing:

> The gang murdered a witness during the course of the trial. [Dazzo] has to take the risk of joining a gang of murderers and . . . will be sentenced as member of a gang with international drug smugglers and murderers . . .
>
> [He will be sentenced] as a member of that gang in order to deter future defendants in this court from directly or indirectly interfering with our witnesses.

He also remarked:

> I'm sure he didn't understand that he was getting involved with murder when he became a member of the gang. But, nevertheless, that's the risk you take when you become involved in a crime . . .
>
> I am assuming that this defendant did not know that the man was going to be murdered, did not approve of it, and would not have approved of it if he had been consulted. I don't think he wasn't aware of the fact that other witnesses were being threatened.

Finally he stated:

> Don't talk about rehabilitation, because I have no intention of rehabilitating him. I'm not going to sen-

> tence him for rehabilitation purposes. He's going to be sentenced for deterrence, solely.

It is apparent that one of the reasons for the sentence was that a witness against a co-defendant was murdered after the conspiracy, although Dazzo had no knowledge that the witness was about to be murdered, did not approve of it and would not have approved of it had he been consulted. In fact, the judge denied that Dazzo was in any way guilty of the murder, although he associated Dazzo with that guilt as a member of the gang which ultimately murdered the witness. Obviously, one of the elements of this sentence was retaliation predicted upon the outrage that a proposed witness at the trial was murdered. The judge hoped to "deter future defendants in this court from directly or indirectly interfering with our witnesses."

As was aptly stated in *United States* v. *Wardlaw*, 576 F.2d 932, 939 (1st Cir. 1978):

> [W]hile sentencing judges have considerable discretion in sentencing, they may not relentlessly pursue at a defendant's cost a single, questionable theory while simply brushing aside all the other criteria commonly weighed by the vast majority of sentencing courts. Defendants were entitled to have their sentences set primarily in terms of the seriousness of their own crimes and associated individual factors. They were not to be viewed chiefly as instruments of retaliation against other, different criminals. The sentences must accordingly be vacated and the cases remanded for resentencing of both defendants.

See also United States v. *Grayson*, 438 U.S. 41 (1978); *Roberts* v. *United States*, 449 U.S. 821 (1980). Dazzo was

sentenced also because of his membership in "a gang of murderers."

Another disturbing element in the sentencing process appeared when the judge stated that he would not sentence Dazzo for any rehabilitation purposes. Rehabilitation is a factor to be considered by every district judge in imposing sentence and cannot be brushed aside solely for deterrence. Mr. Chief Justice Burger in *United States* v. *Grayson, supra*, 438 U.S. at 46, explained:

> Approximately a century ago, a reform movement asserting that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be the rehabilitation of the offender, dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism. (Footnote omitted.)

Accordingly, as early as 1949, Mr. Justice Black in *Williams* v. *New York*, 337 U.S. 241, 247 (1949), stated that the

> prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime. . . .

and that sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders". *Id.*, at 248. *See also United States* v. *Cavazos*, 530 F.2d 4 (5th Cir. 1976).

Dazzo was sentenced to three consecutive five-year terms, a $45,000 fine, and a lifetime special parole. He was only

26 years old, a high school dropout, without a criminal record, and with a wife and child. It is impossible for one to say that he cannot be rehabilitated if he so desires. It is true that there is no constitutional principle that prefers rehabilitation over deterrence, but it is also true that there is no constitutional principle that prefers deterrence over rehabilitation. There is no inconsistency between the two and both must be weighed before imposing sentence.

Since I believe the trial judge did not consider the proper criteria in imposing sentence, it is my conclusion that the sentence should be vacated and the case remanded for resentencing.

Appendix B

(Constitutional Provisions Involved)

U. S. Constitution, Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

(Statutes Involved)

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 3577. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 4216. Young adult offenders

In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.

Appendix C—Statutes Involved

21 U.S.C. § 841. Prohibited acts A

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 952. Importation of controlled substances.

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substances in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be neces-

sary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such reguations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. § 960. Prohibited acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Appendix C—Statutes Involved

Penalties

(b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.